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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 231

J. HUNTER THATCHER, JR.,
Petitioner,

versus

TENNESSEE GAS TRANSMISSION COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Thos. W. Lamar,
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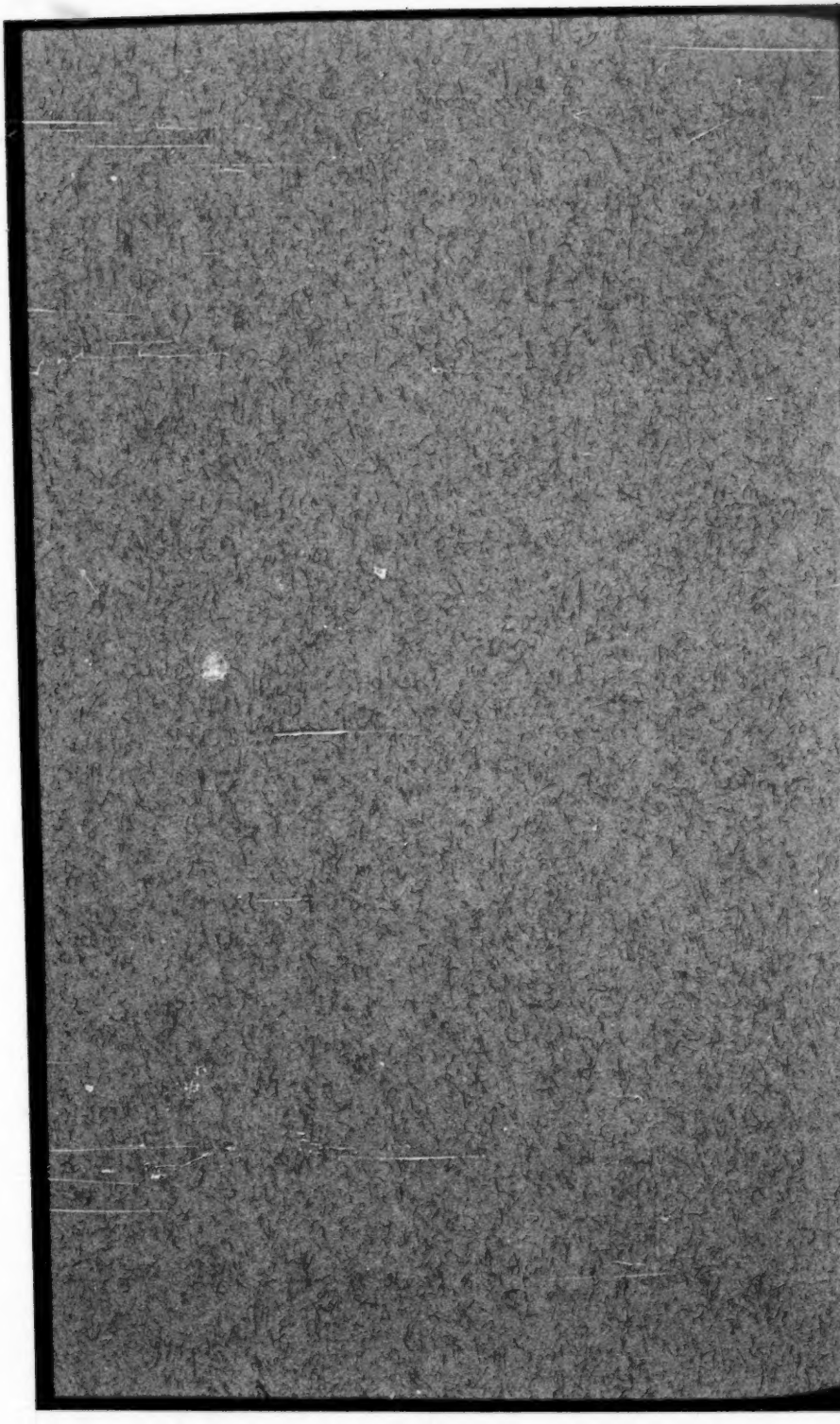

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SUPREME COURT OF THE UNITED STATES

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No. 231

J. HUNTER THATCHER, JR.,

Petitioner,

versus

TENNESSEE GAS TRANSMISSION COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MAY IT PLEASE THE COURT:

The petition of J. Hunter Thatcher, Jr., respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

This is an expropriation suit brought by respondent against petitioner, the object of which is to acquire a natural gas pipeline right-of-way across certain property belonging to petitioner situated in Ouachita Parish, Louisiana.

The substantive right of condemnation upon which respondent relies and which is invoked as the basis for jurisdiction of the Federal Court is found in the provisions of an Act of Congress approved July 25, 1947, which amended Section 7 of the Federal Natural Gas Act by adding thereto a new subsection (h) *(15) U. S. C. A. Section 717 f, Subsection (h))* reading as follows:

> "When the holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000."

Petitioner by appropriate pleadings in the District Court (R. pp. 30-33) as supplemented and amplified in the Circuit Court of Appeals (R. pp. 476-478) attacked the constitutionality of this Act on three grounds:

> (1) That the Act constitutes an unreasonable engagement in and interference with rather than a regulation of interstate commerce and therefore

beyond the powers delegated to Congress by the so-called Interstate Commerce Clause of the Constitution (Article I, Section 8, Clause 3);

(2) That the Act constitutes the taking of property for private rather than public use in conflict with and violation of the provisions of the Fifth Amendment to the Constitution; and

(3) That the Act is in violation and an infringement upon the powers reserved to the several states of the Tenth Amendment.

And by virtue of the asserted unconstitutionality of the amendment upon which respondent's suit is based, petitioner challenges the jurisdiction of the Federal courts over this controversy.

The District Court in a written opinion (R. pp. 422-429) resolved the constitutional and jurisdictional questions adversely to petitioner, and, after a trial on the merits, awarded to respondent the right-of-way which it was seeking upon the payment to petitioner of compensation for the right-of-way thus forcibly taken across his lands. From the judgment (R. pp. 430-437) entered in accord with the trial Court's rulings, an appeal was prosecuted to the Circuit Court of Appeals for the Fifth Circuit.

In an opinion handed down on February 27, 1950 (R. pp. 479-485) the Fifth Circuit Court of Appeals upheld the constitutionality of the amendment which petitioner had questioned and affirmed in all respects the judgment appealed from. In a footnote to that opinion (R. pp. 485-487) entry of judgment in the case was ordered withheld pending the filing with the Attorney General of the United States of a certificate in conformity with the requirements of 28 U. S. C. A. Section 2403, in order that the Attorney General might be given an opportunity to take such steps in the case as he might deem advisable. The Attorney

General, by letter dated April 11, 1950 (R. p. 486), notified the Clerk of the Fifth Circuit Court of Appeals of his determination not to intervene in this proceeding on behalf of the United States, and thereafter judgment was entered (R. p. 487) on April 17, 1950, affirming the judgment of the District Court. A petition for rehearing (R. pp. 488-492) was duly filed, which rehearing was refused (R. p. 493) on May 3, 1950.

Petitioner claims error in the opinion and ruling of the Fifth Circuit Court of Appeals, as well as of the District Court, and seeks relief through the supervisory jurisdiction of this Court.

B

Reasons Relied On for the Allowance of the Writ

In invoking the supervisory jurisdiction of this Court and seeking a review by this Court of the opinion and judgment of the United States Circuit Court of Appeals for the Fifth Circuit, your petitioner shows:

1. That the Fifth Circuit Court of Appeals has decided an important question of constitutional law which has not been but should be settled by this Court; and

2. That, moreover, the constitutional questions thus resolved against petitioner's contentions have been decided in a way probably in conflict with the applicable decisions of this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the said United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all

proceedings in the case numbered and entitled on its docket No. 12,946 "J. Hunter Thatcher, Jr., Defendant-Appellant, vs. Tennessee Gas Transmission Company, Plaintiff-Appellee", and that said decree and judgment of the said United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner ever prays.

J. HUNTER THATCHER, JR.,
By THOS. W. LEIGH,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 231

J. HUNTER THATCHER, JR.,
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TENNESSEE GAS TRANSMISSION COMPANY,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

I

The Opinion of the Court Below

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 180 Fed. (2d) 644.

II

Jurisdiction

1. The statutory provision believed and relied up to sustain the power of this Court to grant this petition is:

New Title 28 United States Code, Judiciary and Judicial Procedure, Section 1254, Paragraph (1).

2. The date of the opinion to be reviewed is February 27, 1950 (R. pp. 479-485), on which judgment was entered on April 17, 1950 (R. p. 487); a petition for rehearing (R. pp. 488-492) was duly filed on April 17, 1950; and such petition was denied on May 3, 1950 (R. p. 493).

3. This is an expropriation suit filed by respondent against petitioner with the object of acquiring a natural gas pipeline right-of-way across petitioner's property. The action is predicated on the substantive rights purported to be granted by the amendment of July 25, 1947, which added a new Subsection (h) to Section 7 of the Federal Natural Gas Act (15 U. S. C. A., Section 717 f. Subsection (h)); and the allegations of respondent's original complaint were such as to bring respondent's action within the jurisdictional prerequisites of that amendment. Petitioner is contesting the constitutionality of that amendment and the jurisdiction of the Federal Courts predicated thereon, but obviously jurisdiction of the controversy exists to the extent of resolving the constitutional questions which petitioner has raised, and thereby determining the question of jurisdiction *vel non.* The right of appeal to the United States Circuit Court of Appeals is provided by *New Title 28 U. S. Code, Judiciary and Judicial Procedure, Section 1291;* except for the exercise of the supervisory jurisdiction of this Court, the decree of the Circuit Court of Appeals is final; and the jurisdiction of this Court to review the opinion and decree of the Court of Appeals now being complained of is specially granted by *New Title 28 U. S. Code, Judiciary and Judicial Procedure, Section 1254, Paragraph (1).*

4. Jurisdiction to issue the writ now being sought has been sustained in many cases. We cite only one, namely, *Federal Power Commission* v. *Natural Gas Pipeline Company,* 315 U. S. 575, 62 S. Ct. 736, 86 L. Ed. 1037.

III

Statement of the Case

A statement of the case has been given under heading "A" in the petition, entitled "Summary Statement of the Matter Involved," and in the interest of brevity, such statement is not repeated here; but the Court is respectfully referred to that Statement.

IV

Specification of Errors

We shall not attempt a detailed specification of errors.

Suffice it, we think, to assert that the opinion of the Circuit Court of Appeals which we now seek to have reviewed is fundamentally erroneous in three basic respects:

(1) in holding that the grant of the right of eminent domain provided by the contested amendment to the Federal Natural Gas Act is a regulation of interstate commerce by Congress within its power under the Interstate Commerce Clause and not the equivalent of an engagement in such commerce above and beyond its power of regulation;

(2) in holding that merely because respondent is a public utility it is within the power of Congress to delegate to it the right to expropriate private property, notwithstanding that the purpose for which such property is to be expropriated is essentially private in character; and

(3) in failing to recognize the essential difference between the power of a state to exercise the right of eminent domain as an end-result and the power of the Federal government to exercise that right only as an incident to the accomplishment of one of its expressly enumerated powers.

V

Summary of Argument

Our Argument will be developed in three main divisions, as follows:

DIVISION ONE

Consideration of the constitutional issue involved in this case.

DIVISION TWO

Enumeration of basic principles applicable to eminent domain.

DIVISION THREE

Discussion of specific grounds of unconstitutionality.

I. Conflict between this Act of Congress and the Interstate Commerce Clause of the Constitution.

II. Conflict between this Act of Congress and the Fifth Amendment to the Constitution.

III. Conflict between this Act of Congress and the Tenth Amendment to the Constitution.

VI

ARGUMENT

DIVISION ONE

Consideration of the Constitutional Issue Involved in This Case

It seems to us, and we respectfully so submit, that the question here involved is whether the United States has the power, under the guise of regulating interstate commerce, to engage, as a public utility, in the business of supplying natural gas to the general public, and, for that purpose, to exercise the power of eminent domain for the construction of a pipeline to transport such gas across state lines to the ultimate consumers thereof in another state.

We recognize of course that the Act here in question does not constitute a direct exercise, by the Congress in the name of the government, of the power of eminent domain; and that it only purports to delegate that power to respondent corporation.

But it seems to us that the principle involved is in nowise thereby affected.

If, as an incident to the carrying out of one of the powers specially delegated to the central government by the Constitution, it becomes necessary for Congress to exercise the inherent power of eminent domain, this it may, of course, do directly, and being empowered to do so directly, it may also exercise this power of eminent domain, indirectly, by delegating its exercise, where appropriate, to a private corporation. But the converse of this proposition is also inevitably true; *that Congress has no right to delegate the sovereign power of eminent domain to a private corporation, unless it initially has the right to exercise this same power of eminent domain for the same purpose in the name of the government.*

It therefore seems to us, and we respectfully so submit, that, in this case, the Court is squarely confronted with the question which was held not to be at issue in the case of *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Company*, 313 U. S. 508, 61 S. Ct. 1050, 85 L. Ed. 1487, where in passing upon the constitutionality of the Flood Control Act of 1938, insofar as it authorized the construction of the Denison Reservoir on Red River in Texas and Oklahoma, the Court pointed out (loc. cit., p. 1502):

> "... *We are not concerned here with the question as to the authority of the federal government to establish on a non-navigable stream a power project which has no relation to, or is not a part of, a flood control project.*" (Emphasis supplied)

In that case the State of Oklahoma had made the contention that features of this dam which served to generate electric energy constituted a private enterprise separable from its flood control features, its contention being stated by the Court as follows (loc. cit., p. 1502):

> "*But Oklahoma points out that the Denison Reservoir is a multiple purpose project, combininig functionally and physically separate and unrelated purposes.* It says that only the top 40 feet of the dam is set apart for flood control and that the lower portions of the dam are designed for the power project and are neither useful nor necessary for flood control. It points out from the Report that a reservoir for flood control only would have a maximum height of 165 feet while a reservoir for flood control and power development would require a maximum height of 185 feet. It therefor earnestly contends that the additional 20 feet in height of the dam requires a very much greater acreage of appellant's domain than would a project for flood control only. *And it insists that Congress is without authority to authorize a taking of Oklahoma's domain for the construction of the water power feature of the project.*" (Emphasis supplied)

And the Court's answer to that contention was as follows (loc. cit., pp. 1502-3):

> ". . . We are not concerned here with the question as to the authority of the federal government to establish on a non-navigable stream a power project which has no relation to, or is not a part of, a flood control project. *While this reservoir is a multiple purpose project, it is basically one for flood control.* There is no indication that but for flood control it would have been projected. It originated as part of a comprehensive program for flood control. * * * Furthermore, it is plain from the Report that the construction of the project so as to accommodate power will increase or augment same of the flood control benefits, including

river flow, which would accrue were the dam to be erected for flood control only. * * * (Emphasis supplied.)

"It is true that the power phase of this project in purpose and effect will carry some of the costs of flood control. * * * *But the fact that Congress has introduced power development into this project as a paying partner does not derogate from the authority of Congress to construct the dam for flood control, including river flow. The power project* is not unrelated to those purposes. * * *" (Emphasis supplied.)

This language, it seems to us, is eloquent with the converse that, if the basic purpose of the reservoir there under consideration had been for the generation of power, and if, *as a power project, the reservoir had been unrelated to its effect upon flood control, the constitutionality of the project would not have been sustained.*

The same question was inherent in this Court's consideration of the case of *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 268, 56 S. Ct. 466, 80 L. Ed. 688. In the *Ashwander* case, which involved the constitutional justification for the Tennessee Valley Authority, your Honors, speaking through Mr. Chief Justice Hughes, stated the issue as follows (loc. cit., p. 699):

"There is a further limitation upon our inquiry. As it appears that the transmission lines in question run from the Wilson Dam and that the electric energy generated at that dam is more than sufficient to supply all the requirements of the contract, *the questions that are properly before us relate to the constitutional authority for the construction of the Wilson Dam and for the disposition, as provided in* the contract, of the electric energy there generated" (Emphasis supplied)

and after carefully pointing out that (loc. cit., p. 700):

"The Congress may not, 'under the pretext of executing its powers, pass laws for the accomplishment of

> objects not entrusted to the government.' Chief Justice Marshall, in M'Culloch v. Maryland, 4 Wheat. 316, 423, 4 L. Ed. 579, 605; Linder v. United States, 268 U. S. 15, 17, 69 L. Ed. 822, 823, 45 S. Ct. 446, 39 A. L. R. 229. *The Government's argument recognizes this essential limitation.* The Government's contention is that the Wilson Dam was constructed, and the power plant connected with it was installed, in the exercise by the Congress of its war and commerce powers, that is, for the purposes of national defense and the improvement of navigation." (Emphasis supplied)

held (loc. cit., p. 701):

> "While, in its present condition, the Tennessee River is not adequately improved for commercial navigation, and traffic is small, *we are not at liberty to conclude either that the river is not susceptible of development as an important waterway, or that Congress has not undertaken that development, or that the construction of the Wilson Dam was not an appropriate means to accomplish a legitimate end.*" (Emphasis supplied)

It will thus be noted that the constitutional authority for the construction of the Wilson Dam was predicated upon its being an aid to navigation. The generation and sale of hydro-electric energy resulting from the construction and use of the dam was regarded as simply incidental to its effect upon commerce. And there is no mistaking the implication that *if the Congress had undertaken the construction of this dam* not as an aid to navigation or for purposes of national defense, but *merely for the purpose of generating hydroelectric energy for distribution and resale to the public, even across state lines, its construction could not have been constitutionally defended.*

In the case at bar (paraphrasing the language of the *Oklahoma* case, *supra*) we are concerned with the question as to the authority of the federal government to construct,

either by itself or by delegation to a private corporation, for the purpose of transporting privately owned natural gas across state lines, a pipeline which, while admittedly classifiable as a public utility, has no relation to, or is not a part of, interstate commerce as a whole.

The Circuit Court of Appeals, in its opinion below, pointed out (R. p. 481):

> "There can be no quarrel with the statement that the transportation or movement of natural gas from the gas producing fields across state lines for interstate distribution and interstate sale in States far removed from the point of production, is interstate commerce.";

and certainly we do not question the verity of that statement.

Congress undoubtedly has the right to exercise regulatory control over the interstate distribution and sale of natural gas, including the interstate business conducted by respondent corporation—not because respondent is a public utility, but because its business constitutes interstate commerce.

But Congress has no right, under the pretext of regulating interstate commerce, to engage, as a public utility, in the transportation and sale of natural gas across state lines, and to exercise its sovereign power of eminent domain as an incident thereto.

The Congress has no power, under the pretext of regulating interstate commerce, to delegate to respondent corporation the right to exercise the power of eminent domain in order to acquire by force *the means of engaging in a business which, because* it extends across State lines, is subject to congressional regulation.

The Congress has no power, under the pretext of regulating interstate commerce, to delegate to respondent corporation the right to exercise the power of eminent domain

in order to acquire by force *the property of a private citizen for the private transportation by respondent of its purely private property.*

The Congress has no power, under the pretext of regulating interstate commerce, to arrogate to itself the right to exercise, by delegation to respondent corporation, *a power of eminent domain which is the exclusive prerogative of the respective states.*

DIVISION TWO

Enumeration of Basic Principles Applicable to Eminent Domain

Before entering upon a discussion of the legal principles involved in the question of constitutionality which we have raised, it is perhaps not out of order to enumerate certain basic principles relating to the exercise by the sovereign of the power of eminent domain which will not, we believe, be seriously disputed:

I

The power of eminent domain exists as an attribute of sovereignty without the need for any constitutional grant.

This principle is stated in *29 C. J. S. 777, et seq., verbo Eminent Domain, Section 2,* as follows:

> *"The prevailing view is that the right or power of eminent domain, which has been called one of the highest powers of government, is an attribute of sovereignty, inherent therein as a necessary and inseparable part thereof, and belonging to the state alone . . .*
>
> *"Such right antedates constitutions and legislative enactments, and exists independently of constitutional sanction or provision, which are only declaratory of previously existing universal law . . ."* (Emphasis supplied)

And has been recognized by the Supreme Court of the United States in the case of *Mississippi and Rum River*

Boom Company v. *Patterson*, 98 U. S. 403, 8 Otto 403, 25 L. Ed. 206, wherein it is stated (loc. cit., p. 207):

> ". . . The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty."

And in the case of the *United States* v. *Jones*, 109 U. S. 513, 3 S. Ct. 346, 27 L. Ed. 1015, in the following language (loc. cit. p. 1017):

> ". . . The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty and, as said in Boom Co. v. Patterson, requires no constitutional recognition. 98 U. S. 406 (XXV., 208)"

And with this principle we have no quarrel. We recognize that nowhere in the Constitution of the United States is the power of eminent domain expressly conferred upon the general government. Nor do we contend that such express mention of this power, even considering the Federal government as one of limited authority, is necessary to its being exercised.

II

The political concept of Government in its sovereign sense which prevails under our democratic system is that all rights and powers are vested in the people and that the Government as such possesses only such rights as are delegated to it by the people themselves.

This concept was asserted in the Declaration of Independence, wherein the framers of that document declared:

> "That to secure these rights, governments are instituted among men deriving their just powers from the consent of the governed.";

it was recognized in the preamble to the Constitution of the United States and in the procedure by which that document was ratified by conventions of the people of the several states; and at an early stage in our political development it was forcefully expressed by Chief Justice Marshall in the case of *McCulloch* v. *Maryland*, 4 Wheat. 316, 4 L. Ed. 579, wherein he pointed out at page 601 of the Law Edition Reporter that:

> "The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

III

Moreover, we have in the United States a dual system of sovereignty under which certain specified powers were delegated by the people to the central government and larger powers were reserved to the sovereign states.

Under this scheme of dual sovereignty, the Federal government was instituted and constituted, according to the preamble of the Constitution,

> "in order to form a more perfect Union, establish justice, insure domestic Tranquillity, provide for the common defense, promote the general welfare, and secure the Blessings of Liberty to ourselves and our Posterity";

but all rights and powers not specifically delegated to the central government by the Constitution, nor prohibited by it to the States, were by the *Tenth Amendment:*

> "reserved to the States respectively, or to the people"

and in order to maintain their own sovereignty in matters not committed to the central government, the people of the respective States formulated their own state Constitutions intended to be the supreme governing authority in matters not specifically delegated to the central government.

This dual concept was clearly pictured by Chief Justice Marshall in the case of *McCulloch* v. *Maryland*, cited *supra*, wherein he pointed out (loc. cit. p. 602):

> ". . . In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."

IV

But it must be borne in mind that the sovereign attributes of the central government on the one hand and the governments of the respective states on the other are impressed with this distinguishing characteristic: that the central government is one of limited authority and can exercise no power not specially delegated to it by the Federal Constitution.

This is made abundantly clear by a further quotation from the case of *McCulloch* v. *Maryland*, cited *supra*, wherein Chief Justice Marshall, in speaking of the central government, pointed out (loc. cit. p. 601):

> "This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted."

V

And the very fact that the power of eminent domain is not enumerated in the Constitution as one of the express powers conferred upon the central government is conclusive demonstration that it cannot be exercised as a plenary power independent of and without relation to the exercise of some one of the powers specially enumerated in the Constitution.

This conclusion is inherent in the language used by Mr. Justice Gray in the case of *Chappell* v. *United States,* 160 U. S. 499, 18 S. Ct. 397, 40 L. Ed. 510, wherein he said (loc. cit. p. 514):

> "It is now well settled that whenever, *in the execution of the powers granted to the United States by the Constitution,* lands in any state are needed by the United States for a fort, magazine, dockyard, lighthouse, customhouse, court-house, postoffice, or any other public purpose, and cannot be acquired by agreement with the owners, the Congress of the United States, exercising the right of eminent domain, and making just compensation to the owners, may authorize such lands to be taken, either by proceedings in the courts of the state with its consent, or by proceedings in the courts of the United States, with or without any consent or concurrent act of the state, as Congress may direct or permit". (Emphasis supplied)

Or, in the language used by Mr. Justice Gray in the case of *Luxton* v. *North River Bridge Company,* 153 U. S. 524, 14 S. Ct. 891, 38 L. Ed. 808, as follows (loc. cit. p. 810):

> ". . . And whenever it becomes necessary for the accomplishment of any object within the authority of Congress, to exercise the right of eminent domain and take private lands, making just compensation to the owners, Congress may do this with or without, concurrent act of the state in which the lands lie. Van

Brocklin v. Anderson, 117 U. S. 151, 154 (29: 845, 846), and cases cited; Cherokee Nation v. Southern Kansas R. Co., 135 U. S. 641, 656 (34: 295, 301)."

VI

But being an incident of sovereignty not required to be enumerated in the United States Constitution, the power of eminent domain is analogous to any other incidental power which must be implied from the provisions of that document.

This principle was recognized by Mr. Justice Peckham in the case of *United States* v. *Gettysburg Electric Railway Co.*, 160 U. S. 668, 16 S. Ct. 427, 40 L. Ed. 576, wherein he said (loc. cit. p. 581):

". . . It is, of course, not necessary that the power of condemnation for such purpose be expressly given by the Constitution. The right to condemn at all is not so given. It results from the powers that are given, and it is implied because of necessity, or because it is appropriate in exercising those powers."

And applying to the power of eminent domain the language used by Mr. Chief Justice Marshall in the case of *McCulloch* v. *Maryland*, cited *supra*, in considering the incidental power of Congress to create a corporation to carry out one of its specially enumerated powers, it may well be said of the power of eminent domain that (loc. cit. 4 L. Ed. 605):

". . . Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it."

As a matter of fact, it would seem clear that the language used in that case by Chief Justice Marshall wherein he pointed out (loc. cit. p. 602):

> ". . . The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished,"

although used in considering the right of Congress to create a corporation, is equally applicable to the exercise by the Congress of its sovereign right of eminent domain.

VII

Moreover, the power of eminent domain cannot be delegated by the central government to some private agency unless the precise power sought to be delegated is exercisable by the government for its own account.

We have not found any adjudicated decision which squarely announces this particular doctrine, but the principle here involved seems so plain as to require no citation. A consideration of the simple rules of agency can leave no doubt as to the correctness of this particular assertion. For it is clear that a principal can under no circumstances delegate to an agent a power which he does not himself possess. *If he has no authority himself to perform a particular act, he cannot create such authority by the simple expedient of delegating the performance of the act to a third person.*

The same must hold true with reference to such right of eminent domain as is exercisable by the central government.

We make mention of this particular point because while

the asserted power of eminent domain here involved has been by the questioned Act delegated to this respondent, a private corporation, in order to gain a true perspective of the extent to which private rights are sought to be invaded in this case, we must face the fact that the attempted exercise of eminent domain here involved, if held to be available to this respondent, must likewise be held to be available to the central government acting in its own name and for its own account.

VIII

Likewise, it should be recognized that the power of eminent domain, although existing independently of the constitution and exercisable as an incident to the carrying out of one of the powers enumerated in that document, is subject to limitations imposed by the Constitution.

This is pointed out in 29 C. J. S. 781, *verbo Eminent Domain,* Section 3, as follows:

> "As appears in Sec. 2 supra, the right of eminent domain exists independently of constitutional provisions; it is not conferred, *but may be recognized, limited or regulated, by the constitutions,* which, aside from requiring that the use for which the power is exercised be a public one, or that compensation be made, or both, operate only on the mode of exercising the right." (Emphasis supplied)

and has likewise been recognized by this Court. For instance, in the case of *United States* v. *Jones,* 109 U. S. 513, 3 S. Ct. 346, 27 L. Ed. 1015, it was pointed out (loc. cit. p. 1017):

> ". . . The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty and, as said in Boom Co. v. Patterson, requires no constitutional recognition. 98 U. S. 406 (XXV., 208).

> ". . . The provision found in the 5th Amendment to the Federal Constitution, and in the Constitutions of the several States, for just compensation for the property taken, *is merely a limitation upon the use of the power.*" (Emphasis supplied)

In the Constitution of the United States there is at least one direct limitation upon the exercise of the power of eminent domain. We refer, of course, to the Fifth Amendment which provides that:

> "nor shall private property be taken for public use, without just compensation."

But there are likewise indirect limitations upon the right of Congress to exercise the power of eminent domain in every specific grant of power enumerated in the Constitution. For if it be conceded that Congress enjoys the power of eminent domain as an incident to the accomplishment of any of its enumerated powers, it follows as a necessary conclusion that if the exercise of this power is not, in fact, a legitimate incident to the accomplishment of one of its specially enumerated powers, the right to exercise the power of eminent domain is excluded. So that, while the *exercise* of this power is implied in any specially enumerated purpose, the prohibition against an abuse of this power is equally implicit.

Moreover, by the Tenth Amendment it is provided that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".

And this provision is likewise an effective and express restraint upon the abuse by Congress of its sovereign power of eminent domain.

IX

And finally it follows of necessity that the power of eminent domain being an attribute of sovereignty is likewise possessed by each of the sovereign states and is exercisable by each state within the boundaries of its sovereignty.

This proposition, of course, needs no citation. However, it should be pointed out, and will be recognized by the Court, that within its sphere of authority the freedom of the state to exercise the sovereign power of eminent domain is far greater than that of the central government. For the principle that the central government is one of enumerated powers is not generally applicable to the several state governments, and the right of eminent domain may be exercised by a state subject only to the limitations upon its exercise set out in its individual constitution; *whereas, as we have pointed out above, due to its peculiar character as a government of enumerated powers, the United States can exercise the right of eminent domain only when it is necessary or reasonably appropriate to the exercise of one of its enumerated powers.*

In other words, the power of eminent domain may be exercised by a state government within constitutional limitations as the *end-result to be accomplished;* whereas, it may be exercised by the national government *only as a necessary and reasonable incident* to the accomplishment of some other purpose specially enumerated in the Constitution.

DIVISION THREE

Discussion of Specific Grounds of Unconstitutionality

With these basic principles in mind, we proceed to an examination of the act here involved in relationship to

the three clauses of the Constitution referred to in our petition under the heading *Summary Statement of the Matter Involved.*

I

The rights assumed to be granted by this amendment to the Federal Natural Gas Act constitute an engagement by Congress in interstate commerce rather than the regulation thereof, and as such are beyond the power of Congress to exercise under the Interstate Commerce Clause of the Constitution (Article I, Section 8, Clause 3).

In addressing ourselves to a solution of this question, we recognize, of course, that the presumption is in favor of the constitutionality of the statute. This rule is pointed out very forcibly by Mr. Justice Peckham in the case of *United States* v. *Gettysburg Electrical Railway Company,* 160 U. S. 668, 16 S. Ct. 427 40 L. Ed. 576, wherein he said (loc. cit. p. 581):

> "In examining an act of Congress it has been frequently said that every intendment is in favor of its constitutionality. Such act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed by this court from the foundation of the government"

and we do not dispute that the burden is on this petitioner to establish the invalidity or unconstitutionality which is here asserted.

It is also true, as pointed out by the District Court in this case (Tr. p. 426) that Congress has the right in the first instance to construe its constitutional power, and that it has by the adoption of this particular amendment indicated its belief that the provisions of this amendment fall within

the ambit of its delegated power to regulate interstate commerce. However, this initial interpretation by the Congress itself is subject to review by the Courts and, as stated by Mr. Chief Justice Marshall in the case of *McCulloch* v. *Maryland,* cited *supra,* (loc. cit. p. 506):

> ". . . Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

As a consequence, while the presumption of constitutionality of a particular statute undoubtedly prevails, and while the considerations which induced the Congress to believe that a particular statute is within its constitutional power are entitled to some weight, nevertheless, these factors are not controlling on the Courts and do not, of themselves, establish as valid an act which, in fact, transgresses constitutional bounds.

Although the considerations which influenced the Congress in adopting this particular statute are not controlling, nevertheless, it is perhaps in order at this point to examine those considerations and ascertain the basis for the belief in Congress that the adoption of this statute was within its constitutional authority. For this purpose, reference is had to the report of the House Committee on Interstate and Foreign Commerce to whom this particular amendment when offered (H. R. 2956) was referred for study and report. This report will be found in the *U. S. Code Congressional Service,* covering the *Eightieth Congress, First Session,* at page *1477.* In that report there is embodied a report from the Federal Power Commission, through its

then chairman, which, in approving the bill and recommending its passage, has this to say:

> "There is respectfully submitted herewith a report on H. R. 2956, a bill to amend Section 7 of the Natural Gas Act, approved June 21, 1938, as amended February 7, 1942, by adding after subsection (g) a new subsection (h) thereto.
>
> "The proposed amendment provides generally for the exercise of the right of eminent domain by natural-gas companies with respect to necessary rights-of-way in connection with the construction and operation of natural-gas pipe lines. This proposed amendment is similar to section 21 of the Federal Power Act which provides for the exercise of the right of eminent domain by licensees regarding dam sites.
>
> "The Commission has no objection to the amendment to section 7 of the Natural Gas Act as proposed in H. R. 2956.
>
> "We have submitted a similar report on S. 1028, an identical bill which has been introduced in the senate."

From this it will be seen that in the view of the Federal Power Commission, (which was presumably adopted as expressing the views of the committee itself) the amendment is similar to section 21 of the Federal Power Act which provides for the exercise of the right of eminent domain by licensees regarding dam sites. In other words, the act now in question was regarded as conferring substantially the same rights with substantially the same constitutional basis as the rights conferred by section 21 of the Federal Power Act (*16 U. S. C. A. Sec. 814*), the constitutionality of which, we might state in passing, had theretofore been sustained by the Courts. In view of this assertion of similarity between the two acts, it is a fair inference that the same tests of constitutionality which had previously been applied to the cited provision of the Federal Power Act

were regarded both by the Federal Power Commission and by the Congressional Committee (and presumably by the Congress itself) as likewise affording a constitutional basis for the provision of the Federal Natural Gas Act now in question; and accordingly, it is in order to examine the provisions of the previous statute reading as follows:

> "When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the District in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000."

A comparison of the two acts, we submit, reveals no such analogy for the reason that the power of eminent domain authorized to be exercised by Section 21 of the Federal Power Act to acquire a dam site for the construction, maintenance, or operation of a dam, reservoir, diversion structure, etc., is in express terms given only:

> ". . . in conjunction with an improvement which in the judgment of the commission is desirable and

justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce."

Whereas, in the act now in question, the *end-purpose* for which the exercise of the power of eminent domain is sought to be authorized is not to benefit interstate commerce generally, but *simply to construct, operate, and maintain a private pipeline or pipelines for the transportation of natural gas.*

In other words, in the Federal Power Act, the right to exercise the power of eminent domain in order to acquire a dam site is predicated upon the fact that the construction of the dam will improve or develop a waterway for interstate commerce. *The fact that the dam might also constitute an instrumentality for the generation of hydroelectric energy which will enter the channels of interstate commerce is purely incidental to the main purpose sought to be accomplished.* There is no attempt made in that Act to authorize the taking of private property solely for the construction of hydroelectric generating plant to generate electricity for distribution in interstate commerce, *whereas, the right of eminent domain sought to be conferred upon respondent corporation by the particular amendment to the Federal Natural Gas Act here under attack has no purpose other than the forcible transfer of property from one private individual to another,* apparently on the tenuous theory that since the product to be transported in this pipeline will find its way into interstate commerce, the taking of petitioner's property and the construction of this facility constitutes a regulation of interstate commerce.

The fallacy of this theory and the point we now make are forcibly illustrated in the case of *Alabama Power Company* v. *Gulf Power Company* (D. C. Ala. 1922) 283 Fed. 606, where the constitutionality of the condemnation section of

the Federal Power Act was under attack. In that case, the contention was made (loc. cit. p. 611):

> ". . . that the effect of legislation is to put the government of the United States into the business, not only of generating, but of transmitting and distributing, intrastate and interstate, power originating at the dams constructed under the government license, which generation, transmission, and distribution it alleged to be aside from or beyond any governmental purpose, but is for the benefit of private corporations or persons licensed to construct the dams on navigable streams."

The Court there observed (p. 612):

> ". . . Admittedly the federal government can take property necessary for the improvement of the navigability of navigable streams, and when it does take property for such purpose—primary or dominant—then what use or disposition the federal government can rightfully—that is, in harmony with the constitutional grant—make of the surplus water wasted at the dam constructed by the government, or by its authorized agency to improve navigation in a navigable stream by the slack-water method, is the question presented, and that I shall undertake to answer."

And in answering the question thus propounded said: (p. 613)

> "This act, providing for navigation and the incidental or servient use of the excessive water which would be wasted at the weir, does not exceed the power granted to Congress. *It might be that, if Congress had adopted a plan for the sole purpose of damming up navigable streams in order to generate and sell water power, such an act would be in excess of the Constitution.* The far-reaching effect of such federal policy would be a departure from that manifested by the act now under consideration. This enactment is for the improvement of the navigability of the stream. This

is the paramount object. *But an act which could be reduced to the isolated proposition that the federal government can dam up streams for the sole purpose of generating hydroelectricity and sell the same might be obnoxious to the organic law. I think it would be palpably in excess of the powers granted to Congress by the Constitution.* U. S. v. Gettysburg, supra; Henderson v. City of Lexington, 132 Ky. 390, 111 S. W. 318, 22 L. R. A. (N.S.) 20; Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170; Fallbrook I. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; Hairston v. D. & W. Ry. Co., 208 U. S. 598, 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008; Sears v. Akron, 246 U. S. 242, 38 Sup. Ct. 245, 62 L. Ed. 688. (Emphasis supplied)

"However, that is not the case here. Ever since Gibbons v. Ogden, supra, it has been uniformly held that the power of Congress under the commerce clause comprehends navigation within the limits of every state, so far as navigation improvement is in any manner connected with commerce, whether interstate or foreign. *The control of power is a mere incident to that of navigation.* In this connection attention is directed to Addyston Pipe Co. v. U. S., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, where it was held that the power of Congress to regulate foreign and interstate commerce includes the power to legislate upon private contracts in respect to such commerce. Certainly, if Congress can legislate on the subject of private contracts as an incident to its power to regulate commerce, it has authority to legislate upon the incidental subject to hydro-electric energy resulting from surplus water at a dam built for navigation purposes." (Emphasis supplied)

Note that in this case the Court recognized, and predicated its holding upon, the distinction which we now point out, namely, that *in the Federal Power Act the fact that the dam to be built upon the dam-site authorized to be expropriated might also be used in the generation and dis-*

tribution of hydro-electric energy, was incidental to the main object sought to be accomplished, namely, the improvement of navigation.

Note also how precisely the Act now under attack falls under the ban pointed out in the cited case. For here we are confronted with an Act *which not only can but must be reduced to the isolated proposition that the Federal government can construct a pipeline for the sole purpose of transporting natural gas for sale across state lines;* and by the provisions of this Act Congress had adopted a plan *for the sole purpose of constructing a pipeline in order to transport and sell the natural gas to be transported therethrough.* Clearly, as pointed out in the cited case, such an Act is palpably in excess of the powers granted to Congress by the Constitution.

The same conclusion was reached by another district Judge in the case of *State of Missouri* v. *Union Electric Light & Power Company* (D. C. Mo. 1930) 42 Fed. (2d) 692, wherein the Court observed (loc. cit. p. 695):

> "Complainants are correct in their contention that, *if the construction and maintenance of the dam is for the prime and sole purpose of generating electricity for commercial purposes, and not for its influence upon navigation, then the subject-matter would not be within the power of the Congress or within the jurisdiction of this court.* Addyston Pipe & Steel Co. v. United States, supra." (Emphasis supplied)

And we might point out, paraphrasing the language just quoted, that *since the construction and maintenance of the pipeline now under discussion are for the prime and sole purpose of transporting natural gas for commercial purposes and not for its influence upon commerce as a whole, then clearly the subject matter is not within the power of the Congress or within the jurisdiction of this Court.*

The views expressed by Judge Clayton in the *Alabama Power Company* case, cited *supra*, were cited with approval by the Circuit Court of Appeals for the Fourth Circuit in the case of *United States* v. *Appalachian Electric Power Company* (CCA 4-1939) 107 Fed. (2d) 769, wherein the Court said (loc. cit. p. 780):

> ". . . For instance, Congress has no authority to construct a hydro-electric dam primarily and only for the development and sale of water power. Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 333, 56 S. Ct. 466, 80 L. Ed. 688; Alabama Power Co. v. Gulf Power Co., D. C., 283 F. 606, 613; Little Falls Fibre Co. v. Ford & Son, 249 N. Y. 495, 507, 164 N. E. 558, affirmed 280 U. S. 369, 50 S. Ct. 140, 74 L. Ed. 483."

It is true that in each of these cases the Court recognized that the object sought to be accomplished by the exercise of the power of eminent domain was the improvement of navigation and held that the fact that generation of hydro-electric energy was an incidental result of the main purpose to be accomplished did not affect the right of Congress to exercise its inherent power of eminent domain in order to accomplish the desired effect on interstate commerce. *But inherent in all these decisions is the negative conclusion that if the primary purpose of the dam, a site for which was sought to be expropriated, had been the generation of hydro-electric energy, such a purpose would have been beyond the constitutional power of the Federal government, and that its incidental right of eminent domain could not have been exercised in order to accomplish that result.*

And this is precisely the situation with which we are confronted in the present case. The primary purpose for which this pipeline is to be constructed is not to regulate commerce as a whole, but simply to bring into existence a facility which, when completed, will be used for the purpose of transporting

private property across state lines, and as such it falls within the ban which was recognized in the cases referred to above.

To further emphasize this point, it is only necessary to ask the question whether or not there is any provision of the Constitution of the United States which would authorize the National government, itself, to construct the pipeline for which a right-of-way is now sought to be condemned. We recognize, of course, that in this case such construction is not being attempted by the United States government, but the private corporation which is constructing this pipeline is undertaking to exercise a right of eminent domain attempted to be delegated to it by the United States Congress. We have already pointed out, and surely it requires no argument to demonstrate the proposition, that the Congress cannot delegate to a private corporation a power which it does not itself possess, and that if it could not itself exercise the right of eminent domain, certainly it has no right to delegate that power to a private corporation.

We have also shown that the right of eminent domain is not one of the enumerated powers granted to Congress by the Constitution; that it is not a power which can be exercised for its own sake and as an end-result; that it can be exercised only as an incidental means of accomplishing some other power which the Congress enjoys under the Constitution. In other words, in order to sustain the right of Congress to exercise, through the instrumentality of a private corporation, the power of eminent domain which is at issue in this case, it must be held that the United States, under the pretext of regulating interstate commerce, could itself construct this pipeline and itself transport natural gas across state lines from sellers in one state to purchasers in another. This is plainly an abuse of the Interstate Commerce Clause of the Constitution which cannot be toler-

ated, since the Interstate Commerce Clause gives to the central government no independent power to *engage* in interstate commerce, but only the right to *regulate* that commerce when it is voluntarily engaged in by private citizens.

The Court of Appeals has, we submit, erroneously confused the *regulation* of interstate commerce with the *engagement* in such commerce.

We have already recognized that the transportation of respondent's privately-owned natural gas across state lines constitutes interstate commerce, subject to Congressional regulation; and it may perhaps be now conceded that the privately-owned pipeline in which respondent's privately-owned natural gas is so transported is itself an *instrumentality* of interstate commerce. But in the case of *Hooper* v. *State of California*, 155 U. S. 655, 15 S. Ct. 207, 39 L. Ed. 300, this Court recognized the distinction which exists:

> ". . . between interstate commerce or an instrumentality thereof on one side and the mere incidents which may attend the carrying on of such commerce on the other";

and *respondent's acquisition of a private right-of-way on which to lay its private pipeline is a mere incident to respondent's engagement in a business which, when engaged in, is, because of its interstate character, subject to federal regulation.*

This Court, in the case of *Mondou* v. *N. Y., N. H., & H. R. Co.*, 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327, defined the word "regulate" as used in the Interstate Commerce Clause of the Constitution, as follows (loc. cit. p. 47):

> " 'To regulate', in the sense intended, is to *foster, protect, control, and restrain,* with appropriate regard for the welfare of those who are immediately concerned and of the public at large." (Emphasis supplied);

and Mr. Chief Justice Marshall, in the case of *Gibbons* v. *Ogden*, 9 Wheat. 1, 6. L. Ed. 23, had pointed out (loc. cit. p. 70):

> "We are now arrived at the inquiry, What is this power? *It is the power to regulate, that is, to prescribe the rules by which commerce is to be governed.*" (Emphasis supplied)

And while the Chief Justice correctly held that the power to regulate is quite as broad and all-inclusive as there is any need for it to be, there is nothing in the language of that, or any subsequent case that we have been able to find, that would make the power of *regulating* interstate commerce extend to and include the power of *engaging* in interstate commerce, or of delegating to a private corporation the right to exercise the power of eminent domain *for the purpose of acquiring the facilities with which to engage therein.*

In the case of *Howard* v. *Illinois Central R. Co.* (W. D. Tenn., 1907), 148 Fed. 997, the District Judge whose opinion was later affirmed by this Court, pointed out (loc. cit. p. 999):

> "Interstate commerce is the trading and trafficking in commodities between and amongst citizens of different states. It is transporting by common carriers passengers and property from one state into another state. It is the selling and buying of a commodity, or commodities, by a citizen of one state to a citizen of another state, which commodity is to be transported from the state of the seller to the state of the buyer, or to another state, and there resold, or used, as may serve the purpose of the buyer. The citizen may be an individual, firm, or corporation. (Citing cases)
>
> "These definitions do not solve the problem here. The interstate feature of it may be, and perhaps is, sufficiently clear. But manifestly the character of commerce legislated about, or on, by the act in question, is not of the varieties or kinds heretofore mentioned. The

commerce mentioned and referred to in the act of June 11, 1906, is the liability of common carriers, engaged in interstate trade or commerce, to their employes. Congress, by the enactment of this law, assumed that this liability is commerce, or so related to or connected with it as to fall within the power of Congress as a proper subject for its legislation under Article 1, Sec. 8, cl. 3, of the Constitution of the United States.

"The demurrant challenges the correctness of this position, and insists that the liability of the employer to the employe for injuries is not commerce at all, and that Congress exceeded its authority under the Constitution in enacting the law in question. No case of the federal Supreme Court, holding that such liability is commerce within the meaning of the commerce clause of the federal Constitution has been cited, and I know of none."

The "commerce" on which the Act now in question purports to operate is the construction of a private pipeline for the transportation by a private corporation of privately-owned natural gas across state lines, and it is our contention that the construction of this pipeline, or the acquisition of the means for its construction, is "not commerce at all" but merely a means to the engagement in commerce.

There is no difference in principle between the power to expropriate a right-of-way on which to lay this pipeline, and the power to expropriate the lengths of pipe which, when joined together, will make up the pipeline to be buried on that right-of-way.

Admittedly, the construction of respondent's gas pipeline, and its exercise of the right of eminent domain in order to implement that construction, *do enable it to engage in a private business* which, because it extends across state lines, is subject to federal regulation. But the mere fact that, because this business, when engaged in, constitutes interstate commerce within the regulatory power of Congress, does not endow Congress with the right to exercise its incidental

power of eminent domain, or to delegate such exercise to respondent corporation, *in order to engage in that business or to acquire or construct the facilities necessary for that purpose.*

The construction of the pipeline sought to be constructed by this plaintiff is clearly an *engagement* in interstate commerce rather than a *regulation* of such commerce; as such it could not constitutionally have been constructed by the Congress, and necessarily, the incidental right of eminent domain could not have been resorted to in order to accomplish its construction. *If Congress could not itself have constructed this pipeline, there would exist no constitutional basis for the exercise by Congress of its inherent and incidental power of eminent domain in order to accomplish such construction.* And obviously, if Congress itself could not exercise the power of eminent domain sought to be delegated to this private corporation, its attempted delegation of a power which it does not itself possess cannot be sustained.

It seems to us clear, and we respectfully so submit, that the provisions of the amendment to the Federal Natural Gas Act here relied upon do not fall within the ambit of the Congress' delegated power to regulate commerce, and as a consequence that they are an abuse and violation of the so-called Interstate Commerce Clause of the Constitution.

II

The ultimate object of the power of eminent domain assumed to be granted by this amendment is the taking of private property for private use in violation of the restriction imposed upon the use of the power of eminent domain by the provisions of the Fifth Amendment to the Constitution.

We have already pointed out at an earlier point in the Argument that the power of eminent domain, while existing

as an inherent right of sovereignty not required to be specifically enumerated in the United States Constitution, is nevertheless subject to the limitations and restrictions otherwise imposed by the provisions of that document. The restriction now to be discussed is found in the Fifth Amendment which provides, *inter alia,* that:

> "Nor shall private property be taken for public use, without just compensation."

Inherent in this amendment are two separate restrictions. Primarily, of course, the restriction is against the taking of private property without just compensation; but in the language here used the further restriction is implicit that private property may not be taken for *private use with or without compensation.* This was pointed out by this Court in the case of *William O. Cole* v. *City of LaGrange,* 113 U. S. 1, 5 S. Ct. 416, 28 L. Ed. 896. In that case this Court was considering the provisions of the Constitution of the State of Missouri reading substantially the same as those of the Constitution of the United States, and said (loc. cit. p. 898):

> "The express provisions of the Constitution of Missouri tend to the same conclusion. It begins with a Declaration of Rights, the sixteenth article of which declares that 'no private property ought to be taken or applied to public use without just compensation'. *This clearly presupposes that private property cannot be taken for private use.* St. Louis Co. Ct. v. Griswold, 58 Mo. 175, 193; 2 Kent, Com. 339, note, 340. Otherwise, as it makes no provision for compensation except when the use is public, it would permit private property to be taken or appropriated for private use without any compensation whatever." (Emphasis supplied).

It is this restriction against the taking of private property for private use to which attention is now directed.

For, even if it be conceded (which we have shown not to be the fact) that the exercise by the Congress of the right of

eminent domain here sought to be delegated to this respondent is reasonably necessary to the regulation by Congress of interstate commerce under the so-called Interstate Commerce Clause of the Constitution, even so, the exercise of this right of eminent domain must still be made to fall within the concept of the taking of private property for *public use* or else it must fall within the ban against the taking of private property for *private use* which is necessarily implicit in the Fifth Amendment.

Clearly, the use for which petitioner's property is here sought to be taken is a private, rather than a public, one.

The case of *Pittsburgh, Wheeling, and Kentucky Railroad Co.* v. *Benwood Iron Works*, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680, aptly illustrates the principle which we are now asserting. That case involved an attempt by the plaintiff railroad to expropriate a right-of-way across private property for the construction of a spur track or siding for the use and convenience of itself and one of its customers to whose plant the siding was proposed to be constructed. The condemnation was sought under an act of the State of West Virginia and was resisted as constituting the taking of private property for private use in violation of constitutional provisions. The condemnee's defense was stated by the Court to be as follows (loc. cit. 2 L. R. A. 684):

> ". . . It denies that the switch, track, railroad and lateral work mentioned in the amended petition is to be a public highway, and free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law, and that it is for public use, etc."

And the question to be decided was posed by the Court in the following language (loc. cit. p. 684):

> "The question here is not one of compensation, but it is whether the petitioner had a right to take the prop-

erty. It, of course, has no right to take private property for private use, but it has the right to take private property for public use on paying a just compensation therefor. The right to take, which depends upon whether it is to be taken for public or private use, is a judicial question, and the decision of the circuit court on that question is subject to review. Baltimore & O. R. Co. vs. Pittsburgh, W. & K. R. Co., 17 W. Va. 812."

In answering this question the Supreme Court of West Virginia held (loc. cit. p. 690):

"The property of railroad corporations, in so far as concerns the ownership thereof, and the profit or gain to be made from their use, is to all intents and purposes private property, although applied to a use in which the public have an interest. Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co., 97 Ill. 506.

"As far as the public is concerned, when what they need is for 'public use', they have a right to invoke the exercise of eminent domain; but in so far as that which concerns them as to their private interests, their profits and gains, is concerned, they stand as individuals, or as merely private corporations, in which the public has no concern, and for such private purposes cannot call into exercise the power of eminent domain.

"Stripped of all the disguises thrown around the case of the petitioner, it is shown that its object is to condemn the land of the defendants for the purpose of enabling it to lay a siding, switch, branch road or lateral work from the main track to the Wheeling Steel Works, a few hundred feet distant, for the purpose, as stated in the original petition, 'of transporting freights to and from said steel works over the petitioner's said railroad.' This clearly was for the private accommodation of both the railroad and steel works, and to make the private business of both more profitable. This was not for a public, but was for a private, use; and the taking of the property, under these circumstances, would be the taking of private property for private use, which is clearly prohibited."

In the case at bar the right-of-way sought to be acquired by respondent will obviously become its private property, and the fact that said right-of-way may be applied, through the medium of the gas pipeline proposed to be constructed thereon, to a use in which the public have an eventual interest does not alter its private character in so far as concerns the ownership thereof and the profit or gain to be made from its use.

This restriction, thus imposed by the Fifth Amendment against the taking of private property for private use, is further illustrated by the divergent decisions reached in the case of *United States* v. *A Certain Tract of Land in Cumberland Township,* wherein the United States, under an Act of Congress which provided for the acquisition and establishment of the battlefield of Gettysburg as a national shrine, sought to condemn certain lands owned by the Gettysburg Electric Railroad Company. The trial Court (67 Fed. 869) concluded that the use to which these lands were sought to be put was not a public one, and in denying the right of the United States to acquire the same through the exercise of its power of eminent domain, held (loc. cit. p. 871):

> "The right of the United States to take private property for public use, upon making just compensation, though questioned in Pollard's Lessee v. Hagan, 3 How. 212, is now fully recognized; *but that this right cannot be exercised, within the limits of the several states, for any purpose which is not incident to some power delegated to the general government, and necessary, or at least adapted, to its execution, is equally well settled.* I Hare, Const. Law p. 346; Kohl v. Tennessee, 117 U. S. 151, 6 Sup. Ct. 670; Cherokee Nation v. Southern Kan. Ry. Co., 135 U. S. 641, 656, 10 Sup. Ct. 905." (Emphasis supplied).

On appeal to this Court, where the case is reported under the title *United States* v. *Gettysburg Electric R. Company,*

160 U. S. 668, 16 S. Ct. 427, 40 L. Ed. 576, the conclusion of the lower Court was reversed and the public character of the use to which these lands were sought to be put was sustained, but the legal principles applied by the lower Court were affirmed, as appears from this Court's statement of the point at issue in the following language (loc. cit. p. 580):

> "The really important question to be determined in these proceedings is whether the use to which the petitioner desires to put the land described in the petitions is that kind of public use for which the government of the United States is authorized to condemn land.
>
> "It has authority to do so whenever it is necessary or appropriate to use the land in the execution of any of the powers granted to it by the Constitution. Kohl v. United States, 91 U. S. 367 (23:499); Cherokee Nation v. Southern Kansas R. Co., 135 U. S. 641-656 (34:265-391); Chappell v. United States, 160 U. S. 499 (ante, 510).
>
> "*Is the proposed use to which this land is to be put a public use within this limitation?*"

The meaning of the term "public use" is, of course, not spelled out in the Constitution and, as will be observed from the opposite conclusions arrived at by two courts in the *Gettysburg* case, cited above, it is susceptible of varying interpretations. However, it is clear in the present case, as it was in the *Benwood Iron Works* case, cited *supra,* that this pipeline is for the private accommodation of this appellee and its private customers and to make the private business of both more profitable. As such the right-of-way here sought to be condemned will be applied not to a public but to a private use, and the taking of appellant's property under these circumstances would be the taking of private property for private use, which is clearly prohibited.

As a matter of fact, in the cases relied upon by respondent in the Court below, in which this Court sanctioned the

exercise by Congress of the right of eminent domain as being incidental to the regulation of interstate commerce, this limitation was specially recognized and it was shown that the uses to which the facilities sought in those cases to be constructed were ultimately destined, *were in fact public uses rather than private ones, and within the permissive language of the Fifth Amendment.*

For example, in the case of *California* v. *Central Pacific Railroad Co.*, 127 U. S. 1, 8 S. Ct. 1073, 32 L. Ed. 150, there was drawn in question the right of the State of California to levy taxes upon the franchises granted to the defendant railroad by the United States Congress for the construction of an interstate railroad and telegraph line, and this Court, in holding that the franchises and privileges sought to be taxed did, in fact, emanate from the Act of Congress, and in demonstrating the constitutionality of the Act by which they were granted pointed out (loc. cit. p. 157):

> ". . . The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain highway and bridges, it would be without authority to regulate one of the most important adjuncts of commerce."

Here it will be noted that the Court correctly viewed the railroad there in question in the light of *a national highway open to use by all the public alike* and thereby coming within the meaning of the term "public use" as found in the Fifth Amendment. *But let it be noted that a railroad open to the public generally and which may be used by all the public freely and without discrimination is a far different facility from a private gas pipeline used exclusively by one corporation for the transportation of its own product from*

one state across state lines to supply its customers in another.

Likewise, the case of *Cherokee Nation* v. *Southern Kansas Railroad,* 135 U. S. 641, 10 S. Ct. 965, 34 L. Ed. 295, also involved the right to construct an interstate railroad, and the right to exercise the power of eminent domain to accomplish its construction. The Court held (loc. cit. p. 302):

> ". . . The question is no longer an open one, as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and therefore subject to governmental control and regulation."

but immediately pointed out:

> ". . . *It is because it is a public highway, and subject to such control, that the corporation by which it is constructed, and by which it is to be maintained, may be permitted, under legislative sanction, to appropriate private property for the purposes of a right of way, upon making just compensation to the owner, in the mode prescribed by law.*" (Emphasis supplied)

Certainly, it cannot be contended here that the pipeline which respondent is seeking to construct and in the construction of which it is attempting to exercise the purported power of eminent domain here involved, "is a public highway established primarily for the convenience of the people, and to subserve public ends."

The third case relied upon by respondent in the Court below was the case of *Luxton* v. *North River Bridge Company,* 153 U. S. 524, 14 S. Ct. 891, 38 L. Ed. 808, which involved the exercise of the power of eminent domain for the purpose of acquiring the necessary approaches for a bridge across the Hudson River between the states of

New York and New Jersey. The Court recognized the principles, which we freely admit, that (loc. cit. p. 810):

> ". . . And whenever it becomes necessary for the accomplishment of any object within the authority of Congress, to exercise the right of eminent domain and take private lands, making just compensation to the owners, Congress may do this with or without a concurrent act of the state in which the lands lie."

and held (p. 810):

> "From these premises the conclusion appears to be inevitable that, although Congress may, if it sees fit and as it has often done, recognize and approve bridges erected by authority of two states across navigable waters between them, *it may, at its discretion, use its sovereign powers, directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce by land, as it undoubtedly may to improve the navigation of rivers for the convenience of interstate commerce by water.*" (Emphasis supplied)

Here, the Court squarely held, correctly so, that the construction of a bridge for the accommodation of interstate traffic generally fell within the power of Congress under the Interstate Commerce Clause of the Constitution, and that to accomplish that object it could exercise the incidental power of eminent domain either directly or through the agency of a corporation created for the purpose. But the construction of a public bridge as a link in commercial travel, open to all the public alike, and available as a channel for the free and indiscriminate flow of commerce among the states, *is far different from the construction of a private gas pipeline closed to the public as a whole and by means of which a product belonging exclusively to the owner of the pipeline is transported from a point of origin*

in one state across state lines to the owner's customers in another.

The Circuit Court of Appeals, in its preliminary discussion of the Natural Gas Act had remarked (R. p. 483):

> ". . . Implicit in the provisions of the statute are the facts, among others, that vast reserves of natural gas are located in States of our nation distant from other States which have no similar supply, but do have a vital need of the product; and that *the only way this natural gas can be feasibly transported from one State to another is by means of a pipe line. None of the means of transportation by water, land or air, to which mankind has successively become accustomed, suffices for the movement of natural gas.*" (Emphasis supplied),

and with reference to the distinction which we now insist upon held (R. p. 484):

> ". . . Counsel for appellant seeks to distinguish the *Luxton* and *Cherokee Nation* cases, *supra,* upon the ground that the corporations there authorized to exercise the power of eminent domain were common carriers whose services were available to each and all alike. *This distinction, however, in no way detracts from the principle ruled in view of the kind of business and product here involved.* This is, in fact and in law, as by the Natural Gas Act declared, a public business and subjected to public control as to its interstate features and, indeed, as to this it can not be conducted at all unless its operations are determined by the Federal Power Commission to be compatible with public convenience and necessity." (Emphasis supplied).

This holding, we submit, is erroneous and is based on expediency alone. It overlooks the principle that the constitutionality *vel non* of any Act of Congress must be measured by the extent of the power conferred on the

federal government by the Constitution, and not on the desirability *vel non* of the results by such Act sought to be accomplished. This was made clear by this Court in the case of *Howard* v. *Illinois Central R. Co.*, 207 U. S. 463, 28 S. Ct. 141, 52 L. Ed. 297, wherein it was held (loc. cit. p. 306):

> "But without, even for the sake of argument, conceding the correctness of these suggestions, we at once dismiss them from consideration as concerning merely the expediency of the act, and not the power of Congress to enact it. We say this since, *in testing the constitutionality of the act, we must confine ourselves to the power to pass it,* and may not consider the evils which it is supposed will arise from the execution of the law, whether they be real or imaginary." (Emphasis supplied):

to which we might also add that the Court may not validly consider the evils which it is supposed will arise from the invalidity, or *non*-execution of the law, whether they be real or imaginary.

Granting that the character of the goods and services which this respondent supplies affect its business with the public interest and constitute it a public utility, and granting that natural gas is not feasibly susceptible of transportation except by means of a pipeline, those factual situations do not justify the exercise of the right of eminent domain sought to be conferred by this act, and do not render the pipeline here involved analogous to the railroads, bridges, and highways which were involved in the line of cases hereinabove referred to, and which, as instrumentalities of general interstate commerce were available to all alike.

If Congress, in the exercise of its power under the Interstate Commerce Clause were attempting to construct or authorize the construction of a transcontinental, common-

carrier, natural gas pipeline highway, through which any producer of natural gas might transport his product from its origin in one state to his own customers in another, then we might have a situation which would be analogous to the railroad, bridge, and highway cases above referred to. *But that is not the type of facility for which the statute now under attack assumes to authorize the exercise of the power of eminent domain.*

And the mere fact that it is not feasible for respondent to transport its privately-owned natural gas other than through a privately-owned pipeline does not bring this case within the purview of the cited cases. *For, regardless of the utility to the public of the natural gas which respondent transports, and however inexpedient it may be to transport this gas by other means than a pipeline, the fact remains that this medium of bringing respondent's private product to its customers in another state is a purely private one, available only to this respondent.*

Any manufacturer who manufactures or produces goods in one state and sells them in another is to that extent serving the public, but the Interstate Commerce Clause of the Constitution cannot by the widest stretch of the imagination be invoked as a constitutional basis for the delegation to such manufacturer by the Congress of the right of eminent domain to acquire the vehicles or other facilities which he may require in order to transport the goods which he produces across state lines to his customers in another state. Admittedly, the transportation and flow of his goods across state lines is interstate commerce subject to regulation by the Congress, but *the acquisition of a private conveyance by which his goods may be* transported are his own affair. The Congress has no right under the pretext of regulating Interstate Commerce, to furnish him with a private means of transporting his goods, or to dele-

gate to him the incidental right of eminent domain in order that he may forcibly acquire these purely private facilities from his fellow citizens.

To do so would constitute the taking of private property for private purposes in contravention of the Fifth Amendment to the Constitution.

III

The power of eminent domain sought to be exercised by Congress in this amendment to the Federal Natural Gas Act is the sole prerogative of the several states, reserved to them by the provisions of the Tenth Amendment to the United States Constitution.

Of course, the fact that the power of eminent domain, the attempted exercise of which is involved in this litigation, exceeds the power of Congress under the so-called Interstate Commerce Clause of the Constitution and is a direct violation of the restriction imposed by the Fifth Amendment upon the power of eminent domain, carries with it the inescapable conclusion that this attempted exercise of the power of eminent domain also constitutes an attempted exercise by Congress of a power not delegated to the Federal government by the Constitution, a violation of and infringement upon the powers reserved to the several states by the Tenth Amendment, and thereby a violation of the provisions of that amendment.

We have already demonstrated that the National government, as distinguished from the several state governments, is one of enumerated powers, and that powers which are the constitutional prerogative of the several states cannot be exercised by the central government unless such powers are specially delegated to it or are reasonably necessary to the exercise of its enumerated powers. As a consequence, while the use of the power of eminent domain in order to

accomplish the construction of the facility here involved may be entirely appropriate as a valid exercise by the state of the powers by it possessed, the attempted exercise of this power of eminent domain to accomplish the construction of this facility by the federal government is in the very teeth of the Tenth Amendment.

This may be illustrated by a comparison of the provisions of the Federal Constitution in regard to the taking of property for public use with the corresponding provisions of the Constitution of the State of Louisiana. We have already pointed out that by the *Fifth Amendment* it is provided that:

> "nor shall private property be taken *for public use,* without just compensation." (Emphasis supplied)

Whereas, an examination of the corresponding provision of the Constitution of Louisiana for 1921, being *Article IV, Section 15* of that document, shows that the language used in that document is as follows:

> "Nor shall vested rights be divested, unless *for purposes of public utility,* and for just and adequate compensation previously paid." (Emphasis supplied)

Note that by the state Constitution vested rights may be divested, or in other words private property may be appropriated, "for purposes of public utility", whereas in the Federal Constitution the restriction is "for public use". The distinction here made requires no elaboration.

It may well be that the purpose for which petitioner's property is now being sought to be taken is one for public utility and therefore within the power of the State Legislature to exercise, either directly or through the medium of a public utility corporation; *but that, of course, does not mean that the power of eminent domain can be exercised by the federal government to the same extent and for the*

same purpose. For the latter's power to regulate public utilities is not plenary, and only stems from the express power to regulate interstate commerce.

The Circuit Court of Appeals in the opinion which we are seeking to have reviewed has, we submit, confused the regulation of *interstate commerce* under *Article I, Section 8, Clause 3* of the Constitution with the regulation of *public utilities as such.* In the course of their opinion their Honors below remarked (R. p. 483):

> "There is no novelty in the proposition that Congress in furtherance of its power to regulate commerce may delegate the power of eminent domain to a corporation, which though a private one, is yet, because of the nature and utility of the business functions it discharges, a public utility, and consequently subject to regulation by the Sovereign."

In this apparently innocent statement there lie, we submit, two fundamental errors into which the Court below has fallen; for it seems to us that:

(1) The proposition is not only novel but wholly untenable that a corporation is subject to regulation by the Congress of the United States simply because by reason of the nature and utility of the business functions which it discharges, it is a public utility; and

(2) The proposition is not only novel but wholly untenable that the Congress in the furtherance of its power to regulate commerce may delegate the power of eminent domain to a corporation which, though a public utility, is nonetheless a private corporation transporting and selling only its own private property.

Understand we do not dispute that under the Constitution of the United States the Congress is authorized to regulate commerce among the several states; nor do we dispute that

with respect to public utilities, where the authority of the several states to regulate the public utilities which serve their respective inhabitants is nullified by the provisions of the Interstate Commerce Clause of the Constitution, the Congress has the inherent and exclusive right to exercise the regulatory power over such utilities which, by that Clause of the Constitution, is denied to the several states.

What we do dispute is that the delegation by Congress to such a corporation of the power of eminent domain over property wholly within the boundaries of a single state for the purpose of enabling such a corporation to transport its private property across state lines for sale to its private customers falls within the area of regulation which is reserved to the central government by the Interstate Commerce Clause.

For there is no language contained in the Constitution of the United States which expressly or by implication would extend to the Congress the right of regulation over a public utility as such, and such right of regulation as is enjoyed by Congress over public utilities whose activities extend across state lines is derived solely from the specific grant of authority to regulate commerce among the several states contained in the Interstate Commerce Clause of the Constitution.

In other words, while the regulatory power of Congress over public utilities engaged in interstate commerce cannot be denied, that regulatory power stems from the general power to regulate commerce among the states; and Congress does not enjoy the plenary authority over public utilities whose activities extend across state lines *which is enjoyed by the several states over public utilities engaged in intrastate business.*

The question of making available to their citizens the services which are comprehended under the general term of public utilities is a concern of the respective states,

rather than of the central government. We do not question the right of a sovereign state, either itself or by delegation to a municipality or other governmental agency, to engage in a business which can properly be regarded as a public utility, as for example, the generation and distribution of electricity to its inhabitants. But that right is predicated upon the general responsibility of the state government in its sovereign capacity to safeguard the personal well-being of its citizens and is in no sense connected with any right on the part of the state government to regulate the commerce which takes place within its borders.

The Federal government has no right under the Constitution to usurp from the several states their responsibility for the individual and personal well-being of their citizens, and it certainly cannot, on the pretext of regulating interstate commerce, enter, either directly or by delegation, the field of public utility *operation*. And if it cannot enter that field, it cannot exercise, either directly or by delegation, the power of eminent domain in order to make possible the *operation* of a public utility.

The exercise of the right of eminent domain here purportedly delegated by Congress to this respondent is a prerogative of the governments of the several states and its attempted exercise by the Congress is a patent violation of and infringement upon the rights and powers of the several states as reserved to them by the Tenth Amendment. As a consequence, for a substantive basis for the exercise by this respondent of the right of eminent domain over petitioner's property, respondent must look not to the Congress but to the State Legislature.

Nor is it material whether or not the State Legislature has seen fit to enact legislation granting to this respondent such a right of eminent domain as it is here seeking to assert. We have already called attention to the language

of Chief Justice Marshall in the case of *McCulloch* v. *Maryland,* cited *supra,* wherein he said (loc. cit. 4 L. Ed. 602):

> ". . . In America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."

And in a realm in which the authority of the state is supreme, its action or inaction is no concern of the Federal government.

It will, therefore, not do to argue that the failure (if such there be) of the state to make provision for the exercise by a corporation situated as is this respondent of the right of eminent domain here sought to be asserted constitutes any justification or constitutional basis for the exercise by the Congress of a power which under the Federal Constitution it does not possess. Nor is there any merit to the plea that if the right of eminent domain here in question cannot be constitutionally exercised by Congress, the building of transcontinental pipelines will become impossible. For so far as this writer has been able to discover, no national legislation has ever been adopted purporting to give congressional authority for the use of the power of eminent domain in the development of the system of telegraph and telephone lines which have brought the citizens of Washington state to within almost immediate talking distance of the citizens of Florida; and the network of transcontinental transmission lines for the transmission of electricity across state boundaries has been developed and is being further expanded without the benefit of any such high-handed legislation on the part of Congress as is here sought to be enforced. It might well be that since the telephone and telegraph lines, like railroads and highways, are usable by and for the use of every citizen alike, the power of

eminent domain could be exercised by Congress to foster their expansion; but the electric transmission lines above referred to, which bring electricity generated in one state to customers in another state many miles away, are in the same category as the gas pipelines of this respondent, and *certainly the failure of Congress to undertake the exercise of the power of eminent domain as an aid to the construction of interstate electric transmission lines has not prevented their construction.*

If as a matter of fact (which we do not concede) any state, including Louisiana, through which these gas pipelines pass, has not provided by state law for a resort to the use of eminent domain to facilitate the construction of these pipelines, that is a matter which addresses itself to the public policy of the state itself and is not a constitutional ground for the national government to arrogate to itself the prerogative, which it does not otherwise possess, of granting the right of eminent domain over lands within such state. And if the Federal government has no constitutional right to invade the field which by this legislation it has sought to occupy, then the answer to respondent's plea will be found by paraphrasing the language of the Supreme Court of West Virginia in the case of *Pittsburgh, Wheeling & Kentucky Railroad Co.* v. *Benwood Iron Works,* cited *supra,* wherein that Court said (loc. cit. 2 L. R. A. 690):

> "The learned counsel for defendant in error in his brief says: 'No deadlier blow could be aimed at the industries of the State than that which this defendant asks the court to deal'.
>
> "It seems to us, if railroad corporations were permitted, ad libitum, to do what this defendant in error asks to be done, 'no deadlier blow could be dealt the private rights of the citizen.' If the doctrine claimed by defendant in error should prevail, then corpora-

> tions might go to any private place they chose, to rolling mills, ice houses, tanneries, sugar refineries, brick yards, grocery stores, etc., and in the country, to stone quarries, coal mines, stock farms, etc., and, if any private citizen dared to stand in the way, violently wrest his property from him for their mere private gain. In such a state of affairs the so-called protection by the Constitution to the rights of private property, by the arbitrary ruling of the courts, would be rendered nugatory and void. The mere declaration in a petition that the property is to be appropriated to public use does not make it so; and evidence that the public will have a right to use it amounts to nothing in the face of the fact that the only incentive to ask for the condemnation was private gain, and it was apparent that the general public had no interest in it. We would do nothing to hinder the development of the State, nor to cripple railroad companies in assisting such development, but at the same time we must protect the property rights of the citizens. All that to which the corporations are entitled under a proper construction of the law they will receive; but they must not, for their own gain and profit, be permitted to take private property for private use."

It is true that the excerpt quoted above applies more aptly to the preceding division of this Argument, but it illustrates beyond any doubt the complete fallacy of any plea for the constitutionality of this act which is based on expediency alone.

It seems to us clear, and we respectfully so submit, that the right of expropriation attempted to be granted by this statute constitutes an end-result not necessarily or reasonably incident to the exercise by the Congress of any of its enumerated powers spelled out in the United States Constitution; that the granting or withholding of this power of expropriation to a private corporation is, therefore, the sole prerogative of the several states, reserved to them

by the provisions of the Tenth Amendment; and, accordingly, that the statute now in question is in conflict with and a violation of that amendment.

We sincerely and earnestly submit that the act now under attack constitutes an engagement by Congress in, rather than a regulation of, interstate commerce in violation of the Interstate Commerce Clause of the Constitution; that it constitutes the taking of private property for private use in violation of the Fifth Amendment; that it constitutes an attempted exercise by Congress of the powers reserved to the several states in violation of the Tenth Amendment; and that, accordingly, it is unconstitutional, null, and void, and as such is ineffective as a basis for the Federal Court's jurisdiction over this alleged controversy.

Conclusion

Although the Court of Appeals rejected our view of the ultimate issue involved in this case, we remain convinced that the implications involved in a finding in favor of the constitutionality of this act are such as to make the ultimate issue one between private enterprise and governmental ownership.

For such right of eminent domain as the Congress can delegate to this respondent, it can exercise directly; and if, on the pretext of regulating interstate commerce, Congress can provide for the construction of an interstate pipeline *solely for the transportation of privately-owned natural gas across state boundaries,* and, as an incident to such construction, exercise its incidental power of eminent domain to accomplish the same, then it can in fact *engage* in interstate commerce on the pretext of *regulating* it, and there is no private industry whose realm the Congress may not similarly invade. For, any private enterprise which extends across state lines is engaged in interstate commerce,

and the goods which it produces and sends across state lines flow through the channels of interstate commerce just as surely as does the gas which this respondent transports from Texas to West Virginia. The coal produced by the coal industry is destined for public consumption just as surely as is the gas produced by this respondent, and the flow of such coal through the channels of interstate commerce is subject to regulation by the Congress just as surely as is the flow of respondent's gas through its proposed pipeline. But the *flow* of this commodity through the channels of interstate commerce is a far different thing from the *instrumentality* by which that flow is accomplished. The instrumentality here involved—a 30-inch pipeline to be used for the transportation of natural gas owned and to be sold by respondent to its private customers—is nothing more than a *vehicle* for the transportation of a species of property, privately owned until it is sold at its destination. This pipeline which respondent is seeking to construct and a right-of-way for which it is seeking to acquire by the exercise of the power of eminent domain is simply a 30-inch *private tunnel,* access to which is denied to the general public and through which only the property of this respondent may be transported. And there is no difference in principle between a private tunnel of this nature built under ground and a private roadway built above the ground, for the construction of which the use of the power of eminent domain has been consistently denied (see *Threlkeld* v. *Third Judicial District Court,* 36 N. M. 350, 15 Pac. (2d) 671, 86 A. L. R. 547).

If the Congress can construct the instrumentality by which the commodity produced and sold by respondent is conveyed across state lines into interstate commerce, then it can acquire the instrumentalities by which steel is produced and conveyed into interstate commerce. If the Con-

gress can construct the pipeline now in question under the guise of regulating interstate commerce, then it follows as a necessary consequence that Congress may acquire the wells or other sources of supply by which this pipeline is made productive and can, itself, *in competition with private industry produce this gas, send it through this conveyor, and sell it to the public, and thus engage in interstate commerce in direct competition with private industry.* And if it can do this so far as the natural gas industry is concerned, then it can likewise do it so far as the electric, steel, coal, or any other private industry is concerned. It can acquire by eminent domain and operate the steel mills or coal mines by which the essential commodities of steel and coal are produced; or the generating plants and transmission lines by which electricity is produced and made available to the public.

If the constitutionality of this statute should be upheld, the necessary and inevitable corollaries resulting therefrom will serve as an entering wedge for the invasion by the National Government of any field of private industry which it may care to invade.

There is, we submit, no escape from this conclusion.

The magnitude of this issue, if present as we believe it to be, combined with the grave doubts which have been pointed out as to whether the right of eminent domain provided by this act is within the power of Congress to exercise or delegate, constitute, we submit, those special and important considerations which justify, if they do not in fact compel, the allowance of the writ now being applied for.

As a consequence, we respectfully submit that the writ of certiorari as heretofore and herein applied for should be granted and the entire case ordered up for review by this Court; and that in due course the judgment and decree of the Circuit Court of Appeals should be set aside and a

judgment entered declaring unconstitutional the amendment of July 25, 1947, which added a new subsection (h) to Section 7 of the Federal Natural Gas Act (*15 U. S. C. A., Section 717 f, subsection (h)*), reversing the decision of the Circuit Court of Appeals and dismissing respondent's suit against your petitioner at its costs.

Respectfully submitted,

THOS. W. LEIGH,
Counsel for Petitioner.

(9283)

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SEP 8 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 231

J. HUNTER THATCHER, JR.,
Petitioner,

versus

TENNESSEE GAS TRANSMISSION COMPANY,
Respondent.

BRIEF ON BEHALF OF TENNESSEE GAS TRANSMISSION COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 231

J. HUNTER THATCHER, JR.,

Petitioner,

versus

TENNESSEE GAS TRANSMISSION COMPANY,

Respondent.

BRIEF ON BEHALF OF TENNESSEE GAS TRANSMISSION COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals, Fifth Circuit, is reported in 180 Fed. (2d) 644, and the opinion of the United States District Court, Western District of Louisiana, is reported in 84 Fed. Supp. 344.

II.

STATEMENT OF THE CASE.

Respondent, a natural gas company subject to the jurisdiction of the Federal Power Commission under the provisions of the Natural Gas Act, U.S.C.A., Title 15, page 177, and as the holder of a certificate of public convenience and necessity issued by the Federal Power Commission, seeks to have adjudicated to it a right of way and easement across lands belonging to Petitioner. Respondent's right to institute and maintain the action is based upon the provisions of an amendment to the Natural Gas Act, Paragraph 717 (f), Subsection (h), reading as follows:

> "When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice

and procedure in similar action or proceeding in the courts of the State where the property is situated; Provided, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.00."

Petitioner, by motion, attacked the constitutionality of this provision of the Natural Gas Act and asked the dismissal of the action. The trial court upheld the constitutionality of the act and made a finding as to the amount due for the right of way and easement. Petitioner appealed to the Circuit Court of Appeals for the Fifth Circuit and that court affirmed the judgment of the trial court.

Petitioner questions the opinion of the Circuit Court of Appeals for the Fifth Circuit and asserts that it is erroneous in holding:

1. That the provision of the Natural Gas Act constitutes regulation of interstate commerce;
2. That it is within the power of Congress to delegate to Respondent the right here to expropriate property.

He also asserts that there is a difference, which the Circuit Court failed to recognize, between the power of a state to exercise the right to eminent domain as an end-result and the power of the Congress to exercise that right only as an incident to the accomplishment of one of its express powers.

Petitioner seeks a review on writ of certiorari by this Court on the asserted grounds:

1. That the Fifth Circuit Court of Appeals has decided an important question of constitutional law which has not been but should be settled by this Court; and

2. That, moreover, the constitutional questions thus resolved against Petitioner's contentions have been decided in a way probably in conflict with the applicable decisions of this Court.

III.

SUMMARY OF ARGUMENT.

A.

The provision of the Natural Gas Act relied upon was enacted in furtherance of the right of Congress to regulate interstate commerce and in no way constitutes engagement by Congress in interstate commerce.

B.

Congress has the power to delegate the right of eminent domain to a concern such as Respondent.

C.

Enactment of Congress is presumed constitutional.

D.

Petitioner has assigned no valid reasons why this Court should review the decision of the court below.

IV.

ARGUMENT.

A.

THE PROVISION OF THE NATURAL GAS ACT RELIED UPON WAS ENACTED IN FURTHERANCE OF THE RIGHT OF CONGRESS TO REGULATE INTERSTATE COMMERCE AND IN NO WAY CONSTITUTES ENGAGEMENT BY CONGRESS IN INTERSTATE COMMERCE.

The Constitution of the United States, Art. 1, par. 8, grants Congress the right to regulate commerce among the several states. The provision of the Constitution has been often examined by the courts and it has been consistently held that Congress thereunder can always foster, protect and guarantee the free and unrestricted flow of interstate commerce.

In 15 *Corpus Juris Secundum*, at page 261, we find the law succinctly stated, as follows:

> "The power conferred upon Congress by the commerce clause of the Constitution is one of the great powers of the national government; and it is not exceeded in importance to the welfare of the nation by any other power granted to Congress. It is not only broad, general, and continuing, but is also distinct and substantive, full, complete, and plenary; and it is subject to no limitations other than those prescribed by the Constitution itself. * * *"

Natural gas has been, from time to time, discovered in large quantities in various sections of the United States. In order for less fortunate sections of the country to have sorely needed gas for domestic and industrial requirements, it has been necessary to construct long-distance pipe lines, the only means through which gas can be transported from the sources of supply to such sections. These lines, by their nature, are not susceptible of state regulation and as their importance to the industrial progress of the nation and the comfort and well-being of its citizens became apparent, it was realized by the Congress that the business of transporting and selling natural gas was affected with a public interest and that Federal Regulation of such business to the extent that it was engaged in interstate commerce was necessary. Accordingly, in 1938 Congress passed the Natural Gas Act.

The necessity for regulation of natural gas companies is stated in the preamble of said Act as follows:

> "As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, *it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.*" (Emphasis ours).

Prior to the adoption of the amendment here relied upon, the Act was by this Court held constitutional. *Federal Power Commission v. Natural Gas Pipe Line Company of America*, 315 U. S. 575, 86 Law Ed. 1037.

A vital part of the regulation of any business affected with a public interest is fostering the proper conduct of that business. The amendment to the Natural Gas Act, relied upon, is a recognition by Congress of this fact. It is, moreover, the exercise of a power specifically reserved to Congress in the Constitution. The result of the amendment is to guarantee that the nation as a whole would be protected in having a free flow of natural gas between the states. Through no stretch of the imagination can it be urged that such amendment was an engagement by Congress in the business of transporting natural gas. Only through the power of eminent domain could a natural gas company be assured of getting its products from one state to another. Indeed instances have arisen heretofore where states have attempted to prevent the exportation of the very product that Respondent is seeking to transport and the courts in each instance have stricken with nullity such attempts. *Pennsylvania v. West Virginia*, 262 U. S. 553, 67 Law Ed. 1117; *West v. Kansas Natural Gas Company*, 221 U. S. 229, 55 Law Ed. 716; *Hansel v. Cowham*, 187 Fed. 403.

The Federal Power Commission, under the Natural Gas Act, having jurisdiction over Respondent's business, rigidly regulates Respondent's transportation and sale of gas. Before Respondent may construct any facility, Respondent must apply to the Federal Power Commission for

authority so to do. Respondent made application for authority to construct the facilities for which the right of way herein sought is needed and the Commission, in granting such authority, found that the construction of the line was required by public convenience and necessity.

As stated, the provisions of the Natural Gas Act provide for regulation. Respondent cannot operate unless it complies with the provisions of the statute which, among other things, require it to provide additions and extensions of service. As stated in the opinion of the Circuit Court of Appeals, "* * * it was proper to make provision whereby the full statutory scheme of control and regulation could be made effective, by the grant to such company of the right of eminent domain. The possession of this right could well be considered necessary to insure ability to comply with the Commission requirements as well as with all phases of the statutory scheme of regulation." The full plan of the Congress of necessary additions and extensions of service and of complete control and regulation could come to naught if it is held that Respondent does not have, under the staute, the right of eminent domain. This is amply demonstrated by the very position Petitioner is now assuming.

If Congress has the power under the reservations contained in the Commerce Clause of the Constitution to insure its full plan of control and regulation of interstate commerce, as to which there can be no doubt, it necessarily follows that the statute here constitutes no invasion of rights reserved to the states.

B.

CONGRESS HAS THE POWER TO DELEGATE THE RIGHT OF EMINENT DOMAIN TO A CONCERN SUCH AS RESPONDENT.

Argument under this subdivision will of necessity bear upon the argument advanced in the preceding subdivision and the authorities cited substantiate both arguments.

This Court has held that Congress is possessed of the power to delegate to a concern such as Respondent the right of eminent domain.

In the case of *Luxton v. North River Bridge Company*, 153 U. S. 525, 38 Law Ed. 808, the plaintiff, incorporated by an Act of Congress, filed a petition for the appointment, under the act creating it, of commissioners to assess damages for the condemnation of approaches to its bridge. The proceeding there, as here, was attacked on the ground that the act of Congress was unconstitutional for the reason that the Congress could not confer on plaintiff the right of eminent domain. The Court sustained the constitutionality of the act on the ground that Congress was empowered to regulate commerce among the several states and to pass all laws necessary for carrying into execution such powers. The Court said:

> "From these premises the conclusion appears to be inevitable that, although *Congress* may, if it sees fit and as it has often done, recognize and approve bridges erected by authority of two states across navigable waters between them, it *may, at its dis-*

cretion, use its sovereign powers, directly or through a corporation created for the object, to construct bridges for the accommodation of interstate commerce by land, as it undoubtedly may to improve the navigation of rivers for the convenience of interstate commerce by water.' (Emphasis ours).

The case of *Cherokee Nation v. Southern Kansas Railroad Company*, 135 U. S. 295, 34 Law Ed. 641, involved the right of a railroad company, a private corporation incorporated under the laws of a State, to condemn property for its interstate railroad. The defense there, as here, was that the Congress could not, in furtherance of its right to regulate interstate commerce, delegate the power of eminent domain to such private corporation. The Court found such delegation proper.

"But it is said that the objects for which the Act of 1884 was passed are not such as admit of the exercise of the right of eminent domain. This contention is without merit. Congress has power to regulate commerce, not only with foreign nations and among the several states, but with the Indian tribes. It is not necessary that an Act of Congress should express, in words, the purpose for which it was passed. The court will determine for itself whether the means employed by Congress have any relation to the powers granted by the Constitution. The railroad which the defendant was authorized to construct and maintain will have, if constructed and put into operation, direct relation to commerce with the Indian tribes, as well as with

commerce among the States, especially with the States immediately north and south of the Indian Territory. *It is true that the Company authorized to construct and maintain it is a corporation created by the laws of a State, but it is none the less a fit instrumentality to accomplish the public objects contemplated by the Act of 1884.* Other means might have been employed, but those designated in that Act, although not indispensably necessary to accomplish the end in view, are appropriate and conducive to that end, and therefore within the power of Congress to adopt. The question is no longer an open one, as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and therefore subject to governmental control and regulation. It is because it is a public highway, and subject to such control, that the corporation by which it is constructed, and by which it is to be maintained, may be permitted, under legislative sanction, to appropriate private property for the purposes of a right of way, upon making just compensation to the owner, in the mode prescribed by law." (Emphasis ours).

The *Cherokee Nation* case is a complete answer to Petitioner's contention. Petitioner's only attempt at distinguishing the *Cherokee Nation* case from the case at bar, is asserting that Respondent's pipe line is not "a public highway established primarily for the convenience of the people, and to subserve public ends." The principle of law is identical, for the Congress has found that Respondent's

interstate business "is affected with a public interest." Under the express provision of the Commerce Clause of the Constitution it has the right to regulate Respondent's business, that of transportation of natural gas between the states. That such transportation is for the convenience of the people, and subserves public ends is clear. It makes no difference whether the "highway" itself or, as here, the product which can only be transported through that "highway", is needed by the people, the power to satisfy each need is the same.

In the *Cherokee Nation* case, *supra*, is also found the following:

> "* * * It is well said by Mr. Cooley in his Treatise on Constitutional limitations, Section 537, that 'while there are unquestionably some objections to compelling a citizen to surrender his property to a corporation, whose corporators in receiving it, are influenced by motives of private gain and emolument, so that to them the purpose of the appropriation is altogether private, yet conceding it to be settled that these facilities for travel and commerce are a public necessity, *if the legislature*, reflecting the public sentiment, *decide that* this general benefit is better promoted by their construction through individuals or corporations than by the State itself, it would clearly be pressing a constitutional maxim to an absurd extreme if it were to be held that the public necessity should only be provided for in the way which is least consistent with the public interest.'" (Emphasis ours).

In the case of *State v. Missouri v. Union Electric Light & Power Company*, 42 F. (2d) 692, there was involved the right to construct a dam across the Osage River. Congress had passed the Federal Power Act. U.S.C.A., Title 16, Paragraph 791, et seq. In the Federal Power Act, Congress had delegated to any licensee under the Act the right of eminent domain, U.S.C.A., Title 16, Paragraph 814. The attack was made that the object was to secure power for a hydro-electric plant which would be operated by the defendant for profit and that, therefore, the dam would be a private enterprise and not for the public interest. The court held the statutory delegation valid and the following excerpts from the opinion answer the attack which Petitioner is making in the present case:

> "At the outset the court is concerned with the fundamental and jurisdictional question as to whether the project is one of federal judicial cognizance. As a postulate to a further consideration of the case, it must be acknowledged, and the parties so concede, that the national government, under the power 'to regulate commerce with foreign nations and among the several states' has full and complete jurisdiction over all matters affecting navigation."
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> * * *
>
> "It is equally a well-settled proposition of law that, if a certain means to carry into effect any of the powers, expressly given by the constitution to the government of the Union, be an appropriate measure, not prohibited by the constitution, the degree of its necessity is a question of legislative discre-

> tion, not of judicial cognizance.' McCulloch v. Maryland, 4 Whet. 316, 4 Law Ed. 579.
>
> "To the foregoing may be added the doctrine that has been laid down with unvarying uniformity: 'That when Congress has, by any expression of its will, occupied the field, that action was conclusive of any right to the contrary asserted under State authority.' Wisconsin v. Duluth, 96 U. S. 379, loc. cit. 387, 24 L. Ed. 668. The adjudged cases on this point are too numerous to require further citation of authorities."

In that case the court, in its opinion, called attention to the powers of the Federal Power Commission, especially to the one authorizing it "to issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State, or municipality * * *" for constructing, operating and maintaining facilities necessary or convenient for navigation and for utilization of power therefrom. The court then said:

> "It may be observed from the foregoing excerpts from the Federal Power Act that the Congress contemplated the utilization of the power created by such dams for industrial purposes. The fact, therefore, that the defendant Union Electric Light & Power Company contemplated the generation of electrical energy for industrial purposes is obviously not out of harmony with the announced purposes of the Congress."

* * *

"The licensee has been granted the power to acquire property by the exercise of eminent domain in express terms. Concededly this right may be exercised as against private property."

Of interest here is the language of the Fourth Circuit Court of Appeals in the case of *Oakland Club v. South Carolina Public Service Authority*, 110 F. (2d) 84. There the Plaintiff was seeking to condemn under the Federal Power Act, which act, as above stated, contains a delegation to a holder of a certificate of public convenience and necessity emanating from the Federal Power Commission, of the right of eminent domain in furtherance of the construction of the facilities authorized. The procedure was questioned and it was held to be proper. From that case is quoted the following:

"* * * The avowed purpose, the history and the philosophy of the Federal Power Act, we think, all seem to confirm this view. The Federal Power Act came to fulfill, not to destroy. It is a remedial statute enacted by the Federal Congress to extend the rights of eminent domain in favor of licensees under the Act. And in statutes of this character, the great dictum of St. Paul: 'The letter killeth but the spirit giveth life', seems particularly applicable. * * *"

"The Federal Power Act expressly gives to the licensee the right to proceed, either in a Federal District Court or in a court of the state in which the land, or other property sought to be condemned, is located. Again, the Federal Power Act expressly

prescribes for conformity, should the condemnor elect to proceed in a federal court, to the practice and procedure in similar proceedings in the courts of the state in which the property is situated. While the Federal Power Act does not expressly give to the condemnor the privileges of eminent domain under the State law, we think that the provisions of this Act just set out quite clearly imply such an interpretation. Any other holding would rob the Act of a measure of consistency which the Federal congress must have desired to give to this Act."

Congress, through the Natural Gas Act, has empowered Respondent, as the holder of a certificate of public convenience and necessity issued by the Federal Power Commission, to exercise the right of eminent domain. The above authorities demonstrate that such delegation is proper.

Petitioner attempts to make some point of the fact that Respondent does not itself sell gas to the general public. This fact is of no importance. The record discloses that Respondent takes gas principally from various fields in the Texas Gulf Coast and Carthage Fields, Panola County, Texas, and delivers such gas to its customers along the line. The bulk of the gas is sold in Tennessee, Kentucky and West Virginia and purchasers from Respondent distribute same to the public in the states of West Virginia, New York, Kentucky, Ohio, Indiana, Pennsylvania and the District of Columbia. So the actual gas that Respondent transports is distributed to the general public.

In the case of *Washington Water Power Company v. Waters, et al*, reported in 186 F. 572, the United States Circuit Court for Idaho and North Dakota commented as follows:

> "The further question is raised that the plaintiff is not a public service corporation, the point being that it does not render a service directly to the public, but in the main furnishes power and electricity for distribution to the consumer by other persons and corporations. I do not deem it essential to an understanding of the ruling that the facts be here stated, or that the principle of law be discussed at length. The objection is I think not well taken."

In the case of *Webb, et al, v. Knox County Transmission Company*, 225 S. W. 1046, there was involved the right to acquire by condemnation a right of way for electric transmission lines. The action was defended on several grounds, among which was that since Plaintiff did not furnish electricity to the public generally or proposed to lease or had leased its facilities to another corporation, it could not exercise the right. In holding for the Plaintiff, the court said:

> "Nor do we think that it is necessary in order to constitute the use for which the land it taken a public use, that the electricity be furnished directly by the petitioner to the public."
>
> "In Curtis on Electricity, Section 63, the rule is stated to be that—'If in the end the property is devoted to a public use, the mere agency or instru-

mentality through which that result is accomplished is a matter of no concern.' "

The rule laid down by the above cited cases is well established. It has been approved by the Supreme Courts of each of the following named states: Kentucky, *Calor Oil & Gas Company v. Nicholas Franzell, et al,* 109 S. W. 328; indiana, *Lowe, et al, v. Indiana Hydroelectric Power Company,* 151 N. E. 220; Virginia, *Nichols v. Central Virginia Power Company, et al,* 130 S. E. 764; West Virginia, *Shepherdstown Light & Water Co. v. Lucas, et al,* 148 S. E. 847; Washington, *State Ex Rel. Woodruff, et al, v. Superior Court in and for Chelan County, et al,* 259 U. 379.

In commenting upon the position of Petitioner here as to the right of Congress to delegate to Respondent the right of eminent domain, the Circuit Court of Appeals stated:

"There is no novelty in the proposition that Congress in furtherance of its power to regulate commerce may delegate the power of eminent domain to a corporation, which though a private one, is yet, because of the nature and utility of the business functions it discharges, a public utility, and consequently subject to regulation by the Sovereign. * * *"

"* * * Counsel for appellant seeks to distinguish the *Luxton* and *Cherokee Nation* cases, supra, upon the ground that the corporations there authorized to exercise the power of eminent domain were common carriers whose services were available to each

and all alike. This distinction, however, in no way detracts from the principle ruled in view of the kind of business and product here involved. This is, in fact and in law, as by the Natural Gas Act declared, a public business and subjected to public control as to its interstate features and, indeed, as to this it can not be conducted at all unless its operations are determined by the Federal Power Commission to be compatible with public convenience and necessity."

C.

ENACTMENT OF CONGRESS IS PRESUMED CONSTITUTIONAL.

Congress has assumed the regulation of Respondent's business. It has said such business is "affected with a public interest, and that federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." Congress has also said that Respondent may exercise the power of eminent domain in acquiring rights of way and easements, and, in effect, that such rights of way and easements, when acquired, are for a public use.

The case of *United States v. Gettysburg Electric Railway Co.*, 160 U. S. 576, 40 L. Ed. 668, involved the right of the United States to condemn property to be used in commemoration of the Battle of Gettysburg. The purpose of the use was stated in an Act of Congress. The contention was that the use was not a public use. The case

was decided in favor of the United States, the court observing:

> "In these acts of Congress and in the joint resolution the intended use of this land is plainly set forth. It is stated in the 2nd volume of Judge Dillon's work on Municipal Corporations (4th ed.), Par. 600, that when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation. Many authorities are cited in the note, and, indeed, the rule commends itself as a rational and proper one.
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> * * *
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> "In examining an act of Congress it has been frequently said that every intendment is in favor of its constitutionality. Such act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed by this court from the foundation of the government.
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> * * *
>
> "* * * The provision comes within the rule laid down by Chief Justice Marshall, in McCulloch v. Maryland, 17 U. S. 4 Wheat. 421 (4:605), in these words: 'Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adequate to that end, which are not prohibited, but consistent with

the letter and spirit of the Constitution, are constitutional.'"

The right of the United States to acquire by condemnation lands for a wild life project was the question before the Court in the case of *In Re United States*, 28 F. Sup. 758. In holding valid the statute authorizing the proceedings and dealing with presumptions as to meaning of "public use" when Congress has declared the use as such, the court, citing numerous cases decided by this Court, stated:

> "A presumption is to be strongly indulged in that the statutes are constitutional; that what Congress has declared to be a 'public use' is presumptively so. 'What makes for the general welfare is necessarily in the first instance a matter of legislative judgment'. * * * 'When the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation.' * * * 'Congress has declared the purpose to be a public use, by implication if not by express words. * * * Its decision is entitled to deference until it is shown to involve an impossibility.' * * * Legislative construction should be given great weight by the courts, * * * and mere doubt as to the constitutionality of an act should be resolved in favor of its validity. * * *"

Let us emphasize that Congress has declared Federal regulation in matters relating to the transportation of natural gas "is necessary in the public interest', and has

occupied the field with respect to the subject before the Court. Congress has, through the Natural Gas Act, provided regulation, and has delegated to licensees under the Act the right of eminent domain. Congress thereby has said a licensees' business is impressed with a public interest; its properties are devoted to a public use. It is submitted that Petitioner has wholly failed to establish any sound basis upon which such pronouncements and the validity thereof may be overturned.

D.

PETITIONER HAS ASSIGNED NO VALID REASONS WHY THIS COURT SHOULD REVIEW THE DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR FIFTH CIRCUIT.

Petitioner sets forth as his basis for seeking a review on writ of certiorari of the decision of the Circuit Court of Appeals the propositions that (1) such court has decided an important question of constitutional law which has not been, but should be, settled by this Court and (2) that said question was decided by the Circuit Court of Appeals in a way probably in conflict with the applicable decisions of this Court.

Neither of these propositions is correct. The identical questions here involved were passed upon and decided adversely to Petitioners contentions in the cases of *Luxton v. North River Bridge Company* and *Cherokee Nation v. Southern Kansas Railroad Company, supra.* Accordingly,

no reasons have been advanced why a review on writ of certiorari should be granted by this Court.

V.

CONCLUSION.

Petitioner's application for a review on writ of certiorari should be denied.

Respectfully submitted,

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